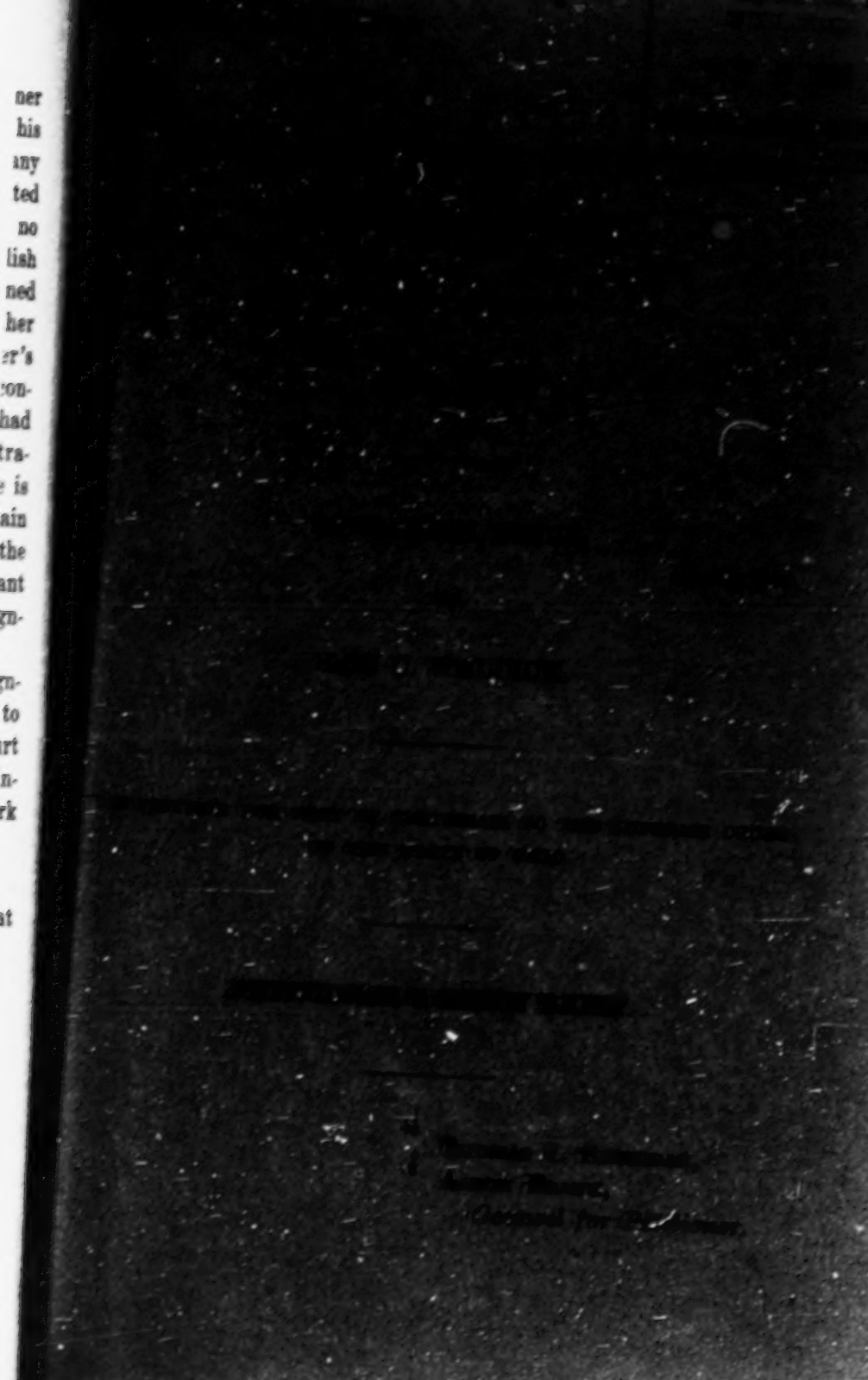

# INDEX.

## TABLE OF CASES CITED.


| | Page |
|---|---|
| *Bass* v. *Milledgeville*, 295 U. S. 721 | 1 |
| *Bell Telephone Co.* v. *Van Dyke*, 296 U. S. 533 | 1 |
| *Clarkson* Case, 274 N. Y. 69 | 5 |
| *Creswill* v. *Grand Lodge*, 225 U. S. 246 | 3 |
| *Davis* v. *Wechsler*, 263 U. S. 22 | 3 |
| *Enterprise Irrig. Dist.* v. *Canal Co.*, 243 U. S. 157 | 3 |
| *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468 | 2 |
| *Klinger* v. *Missouri*, 13 Wall. 257 | 4 |
| *Moran* v. *Horsky*, 178 U. S. 205 | 2, 3 |
| *Northern Pacific* v. *Ellis*, 144 U. S. 458 | 2 |
| *Rector* v. *Ashley*, 6 Wall. 142 | 2 |
| *Ward* v. *Love County*, 253 U. S. 17 | 3 |


## TEXT BOOK.


| | |
|---|---|
| Robertson and Kirkham on "Jurisdiction of the Supreme Court of the United States" | 1, 3 |

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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# No. 188

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EDWARD H. TITUS,

*Petitioner,*

*vs.*

LOU C. WALLICK.

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## PETITIONER'S REPLY BRIEF.

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A careful reading of respondent's brief—interposed to keep this Honorable Court from reviewing the Ohio judgment—reveals that it is built around a half-hearted assertion that the Ohio trial court found that petitioner was not the real party in interest under the law of the forum and that the Ohio judgment is based, therefore, upon an independent ground of State procedure. Respondent seeks to invoke the principle that where an appellate process brings a judgment of a State court before the Supreme Court for review, this Honorable Court will inquire whether the judgment of the State court was based upon a non-Federal ground *adequate to support it.*

*Robertson and Kirkham on "Jurisdiction of the Supreme Court of the United States"*, pages 149, 150;
*Bell Telephone Co. v. Van Dyke*, 296 U. S. 533;
*Bass v. Milledgeville et al.*, 295 U. S. 721.

The foregoing principle has been applied to prevent consideration of Federal rights where the ruling of the State court was based on such independent grounds as a voluntary payment of taxes, *res judicata*, laches and the statute of limitations.

*Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468;
*Northern Pacific Railroad Co.* v. *Ellis*, 144 U. S. 458;
*Moran* v. *Horsky*, 178 U. S. 205;
*Rector* v. *Ashley*, 6 Wall. 142.

It is conceivable that the principle would be accorded recognition where suit on a foreign judgment is defended on the ground of payment after judgment, general release after judgment or lack of capacity to sue by reason of assignment of the judgment and the defense is deemed by the trial court to have been established.

It is noteworthy, however, that the adjudicated cases and the aforementioned illustrations involve non-Federal questions unconnected with a recognized and uncontradicted Federal right. To assert that the judgment creditor may not recover on his judgment in a foreign State because he assigned the judgment after the recovery thereof is not violative of the full faith and credit clause. But to assert that the judgment creditor cannot proceed in another State on the foreign judgment itself by reason of defenses (alleged or real) existing *prior* to its rendition, involves, directly so, *disregarding constitutional safeguards*. That is exactly the instant case. To find that petitioner was not the real party in interest under the Ohio law the Ohio courts determined, first, that petitioner was not the real party in interest in the New York suit, and in making that determination, the Ohio courts went, of necessity, behind the New York judgment, conclusive as to all matters which were actually determined and all matters which *might* have been litigated—including the defense of lack of capacity

to me. *In other words, the so-called non-Federal ground relied upon by respondent is not one independent of the judgment itself* and, therefore, this Honorable Court's jurisdiction to review cannot be contradicted. Any other view of the situation would mean that "a non-Federal ground" could be used as a pretext or cloak to evade a decision of a Federal question and constitutional safeguards might be so warped by State courts as to become "sound and fury, signifying nothing".

The foregoing is not mere theorization. It is simply an oft-repeated and well-established amplification of the rule that the Supreme Court will not assume jurisdiction where a State court based its judgment on a non-Federal ground *adequate to support it*. True amplification of the general principle comprehends three factors: (1) the non-Federal ground must be broad enough to sustain the judgment; (2) it must be independent, that is, *not so interwoven with the Federal question as to be inescapable of separate treatment and determination;* and (3) *a non-Federal ground, plainly untenable, will not defeat review.*

*Robertson and Kirkham on "Jurisdiction of the Supreme Court of the United States"*, pages 156-158;
*Creswill* v. *Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246, 261;
*Enterprise Irrig. Dist.* v. *Canal Co.*, 243 U. S. 157, 163-165;
*Ward et al.* v. *Love County*, 253 U. S. 17, 22;
*Davis* v. *Wechsler*, 263 U. S. 22, 24;
*Moran* v. *Horsky*, 178 U. S. 205.

In *Gaar, Scott & Co.* v. *Shannon, supra*, relied upon by respondent, the principle is expressed in the following language on page 471:

"It is, however, equally well settled that if the Federal question is properly presented and necessarily

> controls the determination of the case, the appellate jurisdiction of this court is not defeated because the decision is put upon some matter of local law. West Chicago R. R. Co. v. Chicago, 201 U. S. 506, 520."

Not only is it clear that the Ohio courts disregarded the full faith and credit clause when they went behind the New York judgment to find that petitioner was not the real party in interest—a ground dependent upon and interwoven with the Federal question—but it is also clear that the non-Federal ground is plainly untenable in view of the abundance of authority on the point that the instrument of reassignment (Petitioner's Exhibits D, E) constituted petitioner the real party in interest. (See Petitioner's Point IV.) The latter disposes, as well, of respondent's reliance on the doctrine expressed in *Klinger* v. *Missouri*, 13 Wall. 257, that where it does not appear upon which of two grounds the decision was based, whether the Federal or non-Federal ground, then this Honorable Court will refuse jurisdiction only if the non-Federal ground (assuming it is independent) is *"a good and valid one"*.

Respondent's contention that it does not appear that the Ohio courts dealt with any Federal question is completely answered on pages 17 and 18 of petitioner's main brief. The Ohio Supreme Court ruled specifically on petitioner's appeal as a matter of right. It may also be stated, parenthetically, that respondent has overlooked petitioner's motion to strike respondent's answer from the files on constitutional grounds (R. 45-47; 52; 101) and that he has likewise disregarded the doctrine that no particular words or phrase are necessary to raise a constitutional question. (See Petitioner's Point I.)

Respondent's fifth proposition, that this Honorable Court will not review the findings upon which the Ohio courts determined that petitioner was not the real party in interest

and that he perpetrated a fraud upon the New York court, is without basis because the findings are completely interwoven with the denial of full faith and credit to petitioner's judgment. (See authorities cited on page 23 of Petitioner's Main Brief.) The Court of Appeals' view that the affidavit (Respondent's Exhibit 7) referred to petitioner's status as of November 23, 1925, left the Ohio adjudication, that petitioner was not the real party in interest and that he perpetrated a fraud, as contrary to the evidence and contrary to law.

The mere enumeration of the following matters raised in petitioner's main brief which respondent has avoided answering bespeaks tacit admission on respondent's part of petitioner's right to relief herein:

1. Respondent has carefully avoided denial of the fact that an adversary trial was had.

2. Respondent has refrained from commenting on the *Clarkson* case, 274 N. Y. 69 (Petitioner's Brief, page 31), pursuant to which petitioner was at least a trustee, capable of bringing suit.

3. Respondent has ignored the historical significance of the "attorney in fact" clause in the reassignment (Petitioner's Brief, page 32).

4. He has disregarded the fact that petitioner is fully capable of granting him complete discharge from his indebtedness (Petitioner's Point IV).

5. He has avoided the charge that a refusal to grant petitioner relief herein would permit respondent to profit from a fraud *proved by documentary evidence* (Petition, page 10).

6. Just as respondent would have had the burden in establishing the defense of payment, release, statute of limita-

tions or assignment of judgment, so he had the burden of proving that petitioner's judgment was impeachable for extrinsic fraud in New York if petitioner was not the real party in interest; and this burden respondent did not meet (Petitioner's Brief, page 26). Respondent makes the ridiculous attempt (Respondent's Brief, page 30) to assert that the New York courts have held that an alleged partial assignment of petitioner's claim to London I. Wallick constituted a fraud upon the court, when all that occurred was that a new trial was granted so that a trial court could weigh the testimony of London I. Wallick in the light of his alleged claim.

7. Respondent has failed to disprove the fact that he possessed knowledge, in March, 1929, of petitioner's prior assignment and that he failed to interpose an appropriate defense in the New York action (Petition, pages 8, 9).

**Conclusion.**

It is respectfully submitted that the writ of certiorari should issue.

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